Supreme Court, U.S.
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No. 85-361

In The Supreme Court of the United States

October Term, 1985

IRVING R. BYKOFSKY,

Petitioner,

-vs-

ROBERT L. HESS as President of Brooklyn College of the City University of New York and the BOARD OF TRUSTEES OF THE CITY UNIVERSITY OF NEW YORK,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

PETITIONER'S REPLY BRIEF

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Text of the Court of Appeals official report of *Bykofsky v. Hess,* found only in 65 NY2d 730, and not duplicated in the unofficial reports 1a

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STATEMENT

The rhetoric of respondents' opposition cannot disguise that petitioner here claims, with considerable substantiation, that the president of Brooklyn College, vested with the power effectively to recommend annual reappointments, had pledged his cooperation in keeping petitioner employed in his public position sufficient to enable him to retire on a 25 year service basis in November 1982, and that the highest Court of the State of New York has held, as a matter of constitutional law, that such an understanding, in and of itself, cannot generate a property interest within the due process protections of our Constitution's Fourteenth Amendment.

the promise to reappoint plaintiff for two years," seems to give sanction to the clever use of language by a college president, in his May 1, 1980 letter—simultaneous with his May 1, 1980 letter reappointing petitioner for the 1980/1981 contract year—to lull petitioner with false assurance while concealing his real intentions:

> "I appreciate your letting me know of your intention to retire in November of 1982. Will you please keep me informed as your plans materialize so that we may plan appropriately." (Petition, p. 8)

But as we have urged in our petition, even if it were to turn out that the statute of frauds was an insuperable State law bar to ultimate recovery by petitioner, the claim of the State of New York that contracts relating to public employment cannot, in and of themselves, generate property rights covered by the due process of law protections of the Fourteenth Amendment and are therefore not capable of forming the basis for remedial 42 U.S.C. §1983 actions, is, we feel, too grave an onslought against constitutional restraints on State power to escape this Court's review nor to gain authoritative status in the public mind because certiorari was denied.

CONCLUSION

For the foregoing reasons, as well as those expressed in our petition, petitioner earnestly prays for the grant of a writ of certiorari herein.

Respectfully submitted,

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Dated: November 5, 1985

APPENDIX TO PETITIONER'S REPLY BRIEF

TEXT OF THE COURT OF APPEALS OF THE STATE OF NEW YORK OFFICIAL REPORT OF *BYKOFSKY V. HESS*, FOUND ONLY IN 65 NY2d 730 (1985) AND NOT DUPLICATED IN THE UNOFFICIAL REPORTS

65 New York Reports, 2d Series 730

IRVING R. BYKOFSKY, Appellant v. ROBERT L. HESS, as President of Brooklyn College, et al., Respondents.

Decided June 6, 1985

SUMMARY

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered January 28, 1985 which (1) reversed, on the law, an order of the Supreme Court at Special Term (Irving S. Aronin, J.), entered in Kings County, denying defendants' motion to dismiss the complaint and denying plaintiff's cross motion for partial summary judgment, and (2) granted that branch of defendants' motion to dismiss the complaint for failure to state a cause of action.

Plaintiff commenced the instant action pursuant to 42 USC §1983 to challenge defendants' failure to renew plaintiff's employment contract for an administrative position at Brooklyn College for the 1981-1982 school year. Plaintiff, an attorney with a long history of service in various positions in New York City government and the City University of New York (CUNY), held his last position, Higher Educa-

tion Officer/Assistant Administrator/Director of Community Affairs at Brooklyn College, until the termination of his employment at the end of the 1980-1981 academic year. Plaintiff's position was one of a group of positions at CUNY which was expressly excluded from the collective bargaining agreement with the professional staff organization and carried no tenure rights. In the spring of 1980, plaintiff's wife was suffering from a serious illness and plaintiff determined that it was important to retire from CUNY no earlier than November 1982, when he would have 25 years of total credited service with the New York City Teachers' Retirement System. On April 30, 1980, plaintiff met with defendant Dr. Robert Hess, who had recently been appointed president of the college, to discuss his situation. According to plaintiff, Dr. Hess assured him that he would reappoint him for the next two successive academic years. Dr. Hess allegedly agreed that their understanding would be memorialized in writing by a letter from plaintiff announcing his intention to retire, and several letters from Dr. Hess reappointing plaintiff to his position for the 1980-1981 academic year, realigning his position under a different office within the college, and expressing Dr. Hess' cooperation in effectuating plaintiff's retirement in November 1982. However, according to Dr. Hess, when he met with plaintiff he agreed only to review plaintiff's contract for the upcoming year and asked plaintiff to submit his future plans in writing; Dr. Hess denied entering into any agreement to reappoint plaintiff for two successive one-year contracts. By letter dated April 27, 1981. Hess informed plaintiff that he was unable to recommend him for reappointment. In December 1981, plaintiff commenced the instant action asserting that defendants' determination not renew his contract deprived him of a property in-

terest in his position in violation of his substantive and procedural rights to due process of law guaranteed by the State and Federal Constitutions.

The Appellate Division concluded that plaintiff had failed to establish that he had a constitutionally protected property interest which was cognizable under the Constitution; that although a constitutionally protected property interest may arise from informal "rules or mutually explicit understandings" promulgated or fostered by a legitimate claim of entitlement to continued employment, plaintiff failed to establish the existence of any university-wide policy at CUNY, written or unwritten, which granted to employees in his classification tenure rights or any other such guarantees of job security; that plaintiff's alleged personal informal understanding with Dr. Hess concerning his retention did not assume the dimensions of a constitutionally protected property interest, created by statute, regulation or government policy which could form the basis for a Federal civil rights action, and that plaintiff could not maintain what was essentially a common-law action to recover damages for breach of contract in the form of a civil rights action where Dr. Hess' alleged oral promise was unenforceable pursuant to the Statute of Frauds, and where the letters exchanged between Dr. Hess and plaintiff did not memorialize the terms of their purported agreement since they omitted an essential term of that "agreement", i.e., the promise to reappoint plaitiff for two years.

Bykofsky v. Hess, 107 AD2d 779, affirmed.

HEADNOTE

Colleges and Universities — Administrative Personnel — Discharge from Employment

In an action in which plaintiff alleged that a college's refusal to renew his contract of employment was a deprivation of his property rights in violation of 42 USC §1983, an order of the Appellate Division, which reversed an order denying summary judgment to defendants and granted the motion to dismiss for failure to state a cause of action, is affirmed for the reason stated in the memorandum at the Appellate Division, which concluded that plaintiff, an administrator, had no tenure rights and that he had failed to establish that he had a protected property interest which was cognizable under the due process clauses of the Federal and State Constitutions.

APPEARANCES OF COUNSEL

Milton Horowitz for appellant.

Robert Abrams, Attorney-General (Lisa R. Dell, of Counsel), for respondents.

OPINION OF THE COURT

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order affirmed, with costs, for the reasons stated in the memorandum at the Appellate Division (107 AD2d 779).

Concur: Chief Judge Wachtler and Judges Jasen, Meyer, Simons, Kaye and Alexander. Taking no part: Judge Titone.